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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3983 of 2005

For Approval and Signature:

HON'BLE MR.JUSTICE D.A.MEHTA
and
HON'BLE MS.JUSTICE H.N.DEVANI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

CENTURY DYEING & PRINTING MILLS
Versus
UNION OF INDIA

Appearance:
1. Special Civil Application No. 3983 of 2005
MR RAMNANDAN SINGH for Petitioner No. 1-2
MR JITENDRA MALKAN for Respondent No. 1
MR YN RAVANI for Respondent No. 2
DS AFF.NOT FILED (N) for Respondent No. 3

CORAM : HON'BLE MR.JUSTICE D.A.MEHTA
and
HON'BLE MS.JUSTICE H.N.DEVANI

Date of decision: 06/05/2005

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.A.MEHTA)

1. Rule. Mr.Jitendra Malkan, the learned counsel for the respondents waives service of rule.

2. This petition seeks a declaration to the effect that it is not open to the respondent to effect recovery of alleged dues of central excise and also declare that the recovery effected through forceful collection of cheques is illegal and unlawful. A further prayer is seeking direction qua respondent No.3 to return the cheques which are not deposited.

3. The petitioner, a partnership firm engaged in business of processing of textiles, dyeing and printing, has approached the Court challenging the arbitrary and high handed action on part of respondent No.3 in initiating recovery of alleged central excise dues which the petitioner firm is not liable to pay in accordance with law. It is averred in the petition that, in connection with some inquiry, in case of one Avinash Exports, petitioner No.2, a partner of the petitioner firm, was required to remain present before the respondent authorities on 12th August 2004 and his statement was recorded. It appears that, during course of inquiry, the petitioner was given to understand that Avinash Exports had claimed 35 rebates for duty paid on exports (which are doubtful) by submitting fake shipping bills. Thus, it is apprehended by the petitioner that the benefit availed of by Avinash Exports is sought to be recovered by fastening the liability on the petitioner, without due process of law. It is the say of the petitioner that the petitioner was required to pay the alleged excise duty said to have been evaded by Avinash exports and for this purpose, the respondent authorities collected various cheques for various amounts. It is the say of the petitioner that the petitioner was not even permitted to obtain xerox copies of such cheques. That some of the cheques so collected have been deposited by the respondent authorities in the bank and the same have been cleared from the account of the petitioner. It is this action which is under challenge.

4. On 14th March 2005, while issuing notice, the Court had stated: "It will be open to the respondent authorities to continue with the inquiries, which are already in process as well issue show-cause notice, if so deemed fit." Pursuant to the notice issued by this Court,

respondent has filed affidavit in reply dated 18th April 2005 sworn by one Shri Satish Shah, Deputy Commissioner (Preventive), Central Excise & Customs, Surat-1.

5. Heard Mr.Ramnandan Singh and Mr.Jitendra Malkan, learned counsel appearing on behalf of petitioner and respondents respectively.

6. In the affidavit in reply, respondent has stated in paragraph No.4 that the petitioner had deposited the cheques for payment of excise duty only with a view to avoid interest liability and penalty, as provided under Sections 11AB and 11AC of the Central Excise Act, 1944 (the Act), and that the same have been deposited voluntarily against wrongly availed CENVAT credit. The basis of the averment is stated to be the statement made by partner of the petitioner firm which is annexed at Annexure "R-1". In the following paragraphs, various averments are made to emphasize the fact that the deposit of cheques was out of volition of the petitioner and that there was no coercion in so far as the respondent authorities are concerned.

7. Mr.Singh appearing for the petitioner has submitted that the petitioner wanted to file affidavit in rejoinder, but as the Court has not granted time, he has been constrained to proceed with the hearing of the matter. It is submitted that the averments in the reply affidavit that the cheques have been deposited out of volition is an incorrect statement. It is further submitted that the petitioner is ready and willing to pay interest and penalty, if leviable in accordance with law after proper adjudication proceedings, subject to the right of the petitioner to challenge any such order in accordance with law.

8. Mr.Malkan, responding to the averments made in the petition, submitted that the entire case of the petitioner is built on so called coercion while effecting recovery of duty and collection of cheques, but the same is not correct. That, as stated in the affidavit in reply, the petitioner, seeking to absolve itself from liability of interest and penalty, has deposited the cheques voluntarily. That it is at a subsequent stage that the petitioner has approached this Court and alleged such coercion.

9. During course of hearing, Mr.Malkan was called upon to point out a provision under the statute on the basis of which the respondent authorities were empowered to either effect such recovery or retain the funds. The

reply was in case of illegal transactions which have come to light subsequently, it was open to an assessee to make deposit of the duty voluntarily and this would grant the assessee immunity against levy of interest and penalty by virtue of Sections 11AB and 11AC. However, except referring to paragraph No.17 of the affidavit in reply, the learned counsel was not in a position to point out as to what were the transactions which were not reflected in the records maintained by the petitioner and which had been discovered by the respondent authorities.

10. In this connection, it is necessary to reproduce paragraph No.17 of the affidavit in reply dated 18th April 2005 :

> "17. In view of the above facts, it appears that M/s Century Dyg. & Ptg. Mills have not received any grey fabrics for processing from M/s Avinash Exporters and have not supplied any processed fabrics to M/s Avinash Exports and has done only paper transaction to enable M/s Avinash to claim fraudulent rebates. M/s Avinash Exports has availed fraudulent rebate claims on the strength of bogus export documents on which M/s Century Dyg. & Ptg. Mills has been shown as the manufacture of the Processed fabrics. As such, it appears that M/s Century Dyg. & Ptg. Mills is involved in the fraudulent rebate claim by issuing ARE-1 and taking fake CENVAT credit without actual movement of goods and they have abetted in the fraudulent rebate Claim with M/s Avinash Exports."

11. On going through the aforesaid paragraph, it becomes apparent that the entire fraudulent practice is ascribed to Avinash Exports and the inquiry is also in relation to the fraudulent rebate claim made by Avinash Exports. The charge in the last sentence of the paragraph that could be fastened on the petitioner firm, even as per the respondent Department, is that the petitioner firm abetted Avinash Exports in making such fraudulent claim. It is an admitted fact that the inquiries in case of Avinash Exports are yet in progress and are not complete. Thus, a liability which might be likely to be fastened on Avinash Exports at some future point of time can in no circumstance be said to be a liability which is payable in praesenti. If that be so, the petitioner firm cannot be saddled with such liability in connection with transactions regarding which inquiry is yet going on.

12. In absence of any statutory provision on the basis of which any such recovery can be made, the action of the respondent authorities in collecting the cheques from the petitioner cannot be sustained in law. The position in law is well settled that liability to excise duty can arise on the production / manufacture of the excisable goods or at best on removal of such excisable goods. In the present case, the respondent authorities have failed to show any such taxing event having taken place on the basis of which they would be entitled to effect such recovery. Any tax or duty can only be levied and collected in accordance with law, namely, backed by and supported by appropriate provision empowering the authority to undertake such an exercise of levy and collection. The respondent authorities must bear in mind that they are creatures of statute and are bound by statutory law; the powers that they exercise are granted to them by the statute and there are no powers dehors the statute. Therefore, the authorities are bound to act as provided by the provisions under which they can exercise such powers. The revenue is not an organization which is entitled to retain money without sanction of law. Therefore, without entering into the controversy as to whether payment was voluntary or otherwise, in absence of any statutory backing, the funds recovered by the respondent authorities by way of various cheques collected by them, cannot be permitted to be retained and are required to be refunded forthwith. The learned counsel for Revenue has failed to point out a provision which empowers the authorities to collect and retain cheques in this manner.

13. Needless to state that this action, namely, of refunding the amount, will not entitle the petitioner to contend that it is absolved on merits, in case at the end of inquiry and adjudication process, it is found that the petitioner becomes liable to pay duty in accordance with law. It is further made clear that the respondent authorities are entitled to proceed with the inquiries which are already in progress and if necessary and deemed fit, issue show cause notice to the petitioner in accordance with law; thereafter pass an order of adjudication in accordance with law after hearing the petitioner.

14. In the result, the action of the respondent authorities in collecting various cheques for various amounts is not sustainable in law and is accordingly quashed. The respondent authorities are directed to refund the total sum recovered by way of encashment of various cheques up till now to the petitioner forthwith,

but not later than a week from today i.e. on or before 13th May 2005, without waiting for a certified copy of the order or a writ of this Court. Similarly, the respondent authorities are also directed to return the unencashed cheque / cheques that they might be holding out of the various cheques collected by them.

15. The petition is accordingly allowed. Rule made absolute. There shall be no order as to costs.

[D.A.MEHTA, J.]

[H.N.DEVANI, J.]

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